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No. 02-991

In The
Supreme Court of the United States

BETTY J. WATKINS,

Petitioner,

vs.

NORTEL NETWORKS, INC. D/B/A
NORTHERN TELECOM, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Nortel Networks Inc. is a wholly owned subsidiary of Nortel Networks Limited, which is a wholly owned subsidiary of Nortel Networks Corporation, which is a publicly traded company.

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RULES CITED:

Sup. Ct. R. 10 1

STATEMENT

There are no compelling reasons for the Court to grant this petition. This is a state law case. It resides in federal court only by the happenstance of diversity jurisdiction. In her pleadings the Plaintiff/Petitioner ("Plaintiff") raised only state law claims governed by Georgia tort law. She raised no age discrimination claims, under state or federal law, and thus *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998) ("*Oubre*") has no bearing on this case. Further, Plaintiff has raised no constitutional issues. As no federal question is involved, there exists no conflict between or among the courts of appeals, between any state court and any federal court, or between any court and this Court. In short, none of the illustrative considerations governing the Court's decision to grant discretionary review, as enumerated in Sup. Ct. R. 10, are found here. The petition should be denied.

RESPONSE TO PETITIONER'S STATUTORY PROVISIONS INVOLVED

Because Plaintiff's excerpts from the Older Workers Benefit Protection Act ("OWBPA") make little sense as excerpted, for clarity Defendant/Respondent ("Defendant") offers the following fuller excerpt:

(f) Waiver

> **(1)** An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum –

> **(F)(i)** the individual is given a period of at least 21 days within which to consider the agreement; or
>
> **(ii)** if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;
>
> **(G)** the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired. . . .

29 U.S.C. § 626(f)(1)(F) and (G).

Notably, the other three statutes which Plaintiff lists as pertinent are all Georgia state statutes.

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Plaintiff originally brought this suit in the Georgia state court alleging fraud, duress and mutual mistake under Georgia law in connection with a severance agreement and release she had signed three years earlier. (R1-1-Ex. 1). She sought rescission and damages. *Id.*

Defendant, her ex-employer, caused the case to be moved to federal court based on diversity of citizenship and an amount in controversy exceeding $75,000. 28 U.S.C. § 1332(a)(1). (R1-1-Ex. 1).

Plaintiff filed an Amended Complaint which, by her own admission, reduced the scope of her original Complaint by removing damages claims. (R1-15 Petition for a Writ of Certiorari ("Petition"), p. 3). Neither her original Complaint nor her Amended Complaint mentioned the Age Discrimination in Employment Act ("ADEA") or the OWBPA. Defendant filed an Answer denying any liability and averring that Plaintiff could not rescind her contract because she did not promptly seek rescission, did not return the benefits she received under the contract, and had affirmed the contract. (R1-18).

Defendant filed motions for summary judgment on Plaintiff's claims and on Defendant's counterclaim (R1-17, and -20), which the district court granted in a well-reasoned opinion. (R2-45). The district court held that Plaintiff had waived all her claims because she unreasonably delayed in attempting to rescind her contract, having waited many months after she first suspected fraud. While acknowledging that its waiver ruling obviated the need for further analysis, the district court further concluded that Plaintiff's admitted failure to tender back the benefits she received under the contract, as Georgia law required her to do, precluded her from rescinding her contract.

Plaintiff appealed to the Eleventh Circuit Court of Appeals. Neither side requested oral argument. The Court of Appeals affirmed the district court in a per curiam decision, upholding the district court's result and reasoning in all respects. (R2-47). The appellate court denied Plaintiff's petition for *en banc* review. Plaintiff then filed the present Petition.

RESPONSE TO PETITIONER'S STATEMENT OF FACTS

The district court's opinion, reproduced in the Appendix to the Petition, contains the relevant facts. Defendant will briefly highlight a few facts pertaining to the Petition.

Defendant employed Plaintiff for a number of years. (Pl. Dep. R1-15-16). When Plaintiff heard about Defendant's planned reduction-in-force, she requested and received an early retirement. (Pl. Dep. R1-20-22, 36-38). In this connection she signed a severance contract and release ("contract") which provided her with certain stated benefits. (Pl. Dep. R1-45-50). The contract contained an express release of all claims against Defendant "to the extent permitted by law," including common law tort claims "such as . . . misrepresentation." (Pl. Dep. R1-Exhs. 2 and 4).[1]

Plaintiff testified that she suspected fraud approximately one month after signing the contract. (Pl. Dep. R1-113). She continued to work for Defendant for five months thereafter, after she had accepted payments under the contract. (Pl. Dep. R1-45-46).

By Plaintiff's own admission, at no time, then or since, has she made any effort to return the amounts she received under the contract. (Pl. Dep. R1-116-117).

Over seven months after she left Defendant's employ, and more than a year after she signed the contract, Plaintiff

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[1] While it does not ultimately matter under the situation of this case, by its express terms the contract in fact complied with the OWBPA in all respects. (Pl. Dep. Exhs. 2 and 4).

called a company representative to complain, for the first time, that she had been unfairly terminated. (Pl. Dep. R1-27-29, 56).

At no time has Plaintiff asserted that Defendant discriminated against her on the basis of her age.

RESPONSE TO PETITIONER'S REASONS FOR GRANTING THE PETITION

The crux of Plaintiff's argument is that this Court should extend *Oubre* to include purely state law claims. There is no basis for such an unprecedented extension of federal statutory law into state common law absent express statutory authorization. Plaintiff cites no statutory language and no legislative history to suggest that Congress even remotely intended such a result, nor to Defendant's knowledge has this Court or any other court extended its reach to such an alarming extent.

In her pleadings Plaintiff asserted no age discrimination claim, no claim under any federal statute, and no constitutional claim. She sought rescission of a contract based on allegations of fraud, duress and mutual mistake under Georgia law. As the district court opinion makes clear (Petition, App. 6), under Georgia law an undue delay in seeking rescission of a contract, even delays shorter than those encountered here, results in a waiver of a fraud claim. Thus, as a matter of law – Georgia state law – her claims are barred. For that reason alone, Defendant was entitled to summary judgment, as both courts below held. In no way does that implicate federal law. On this part of the lower courts' holding, which is dispositive, Plaintiff simply argues that waiver is a jury question, not suitable

for summary judgment treatment. (Petition, pp. 8, 11). Again, that is purely a state law question for the Georgia state courts to address, and in fact they have addressed it, as the district court found.[2] How state courts handle summary judgment motions is hardly an appropriate topic for the Supreme Court of the United States to explore.

Next, Plaintiff argues that the lower courts erred in holding that Plaintiff's failure to tender back what she received under the challenged contract barred her from bringing this action. Georgia law clearly imposes such a tender-back requirement, as the district court observed. (Petition, App. 6-7). Plaintiff argues that *Oubre* erases the tender-back requirement, or that the Court should extend it to do so. This argument contains several fatal flaws.

First, both courts below acknowledged that resolution of the waiver issue effectively ends the case. The tender-back point was simply another path to the same result, amounting to no more than *dicta*.

Second, again as both lower courts note, in *Oubre* this Court dealt only with releases covered under the Older Workers Benefit Protection Act ("OWBPA"), in which Congress established specific requirements for the waiver of, in the words of the statute itself, "any right or claim under this chapter." "This chapter" refers to chapter 14 of

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[2] Plaintiff cites several Georgia state court decisions (Petition, pp. 14-15), all of which support Defendant's position that a rescission must be made with reasonable promptness. Further, the very fact that Plaintiff cites state cases on this issue reinforces Defendant's main point in opposition to the Petition: This is a state law case.

title 29 of the United States Code, i.e., the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*; the OWBPA is a 1990 amendment to the ADEA. The plaintiff in *Oubre* sued for constructive discharge under the ADEA and a parallel state statute. In the present case, Plaintiff has asserted no such claims. Thus the ADEA does not apply, the OWBPA does not apply, and *Oubre* does not apply.

Third, in *Oubre* this Court expressly acknowledged that it was construing specific provisions of a specific federal statute, and that claims unrelated to that statute were not affected by its holding:

> The OWBPA governs the effect under federal law of waivers or releases ***on ADEA claims*** and incorporates no exceptions or qualifications. The text of the OWBPA forecloses the employer's defense, ***notwithstanding how general contract principles would apply to non-ADEA claims.***

Id., 522 U.S. at 427 (emphasis added).

> As a statutory matter, the release cannot bar her ADEA suit, ***irrespective of the validity of the contract as to other claims.***

Id., 522 U.S. at 428 (emphasis added).

Next, at least one other court has considered and rejected Plaintiff's claim: *Bennett v. Coors Brewing Co.*, 189 F.3d 1221, 1234 (10th Cir. 1999) (noting that plaintiff's failure to tender back severance benefits can act as a ratification of waiver of state law claims, as contrasted to

ADEA claims under the OWBPA).[3] Plaintiff has cited no case, and Defendant knows of none, supporting her argument. Nor does Plaintiff cite any legislative history under the ADEA or the OWBPA which would offer her any support. As shown, the language of the statute itself confounds her contentions.

Finally, Plaintiff's arguments lack a sound policy basis. She characterizes what she wants as an "extension" of *Oubre*, but in fact she seeks a far wider sweep than that. If her position were to prevail, then virtually every employment-related release would be subject to an *Oubre* challenge, regardless of its context. The reason is that releases typically include language that preclude "any and all claims," or words to that effect. Plaintiff contends that this language necessarily includes ADEA claims, and that even where, as here, a party seeking to avoid waiver has not asserted an ADEA claim, the release may not be enforced because it could *potentially* affect an ADEA claim. Petition, p. 9. Her proposed rule would effectively eviscerate all releases, a draconian result Congress could never have intended. Moreover, Plaintiff's policy argument – that a tender-back requirement effectively denies persons the ability to challenge waivers – applies as well to challenge the common law of waiver as it exists in many states. She would force all states to allow parties to releases to simultaneously retain all benefits under the

[3] Similarly, other courts have declined to extend *Oubre* in a variety of contexts. *See, e.g., Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 373, 375-376 (5th Cir. 2002); *Adams v. Moore Bus. Forms*, 224 F.3d 324, 327 (4th Cir. 2000); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 13 (1st Cir. 1999); *Kulling v. Grinders for Industry, Inc.*, 185 F. Supp. 2d 800, 814 (E.D. Mich. 2002).

release while rescinding the release contract and repudiating all obligations under it. Again, that is hardly what Congress meant to do, it is directly contrary to what this Court said in *Oubre* with respect to non-ADEA cases, and it does not represent good policy.

CONCLUSION

For all the foregoing reasons, the Petition should be denied.

Dated: February 28, 2003

Respectfully submitted,

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